

**U.S. Department of Labor**

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**Issue Date: 15 October 2004**

Case No.: 2000-LHC1616, 2004-LHC-1246

OWCP No.: 5-104179

In the Matter of:

LINDA WATKINS,  
Claimant,

v.

NEWPORT NEWS SHIPBUILDING  
AND DRY DOCK COMPANY,  
Employer.

Appearances:

John Klein, Esq.  
For Claimant

Benjamin M. Mason, Esq.  
For Employer

Before:  
LARRY W. PRICE  
Administrative Law Judge

**DECISION AND ORDER ON REMAND AND MODIFICATION**

This proceeding arises from a claim filed by Linda Watkins (Claimant) against Newport News Shipbuilding and Dry Dock Company (Employer), under the Longshore and Harbor Worker's Compensation Act, 33 U.S.C. § 901 et. seq., (hereinafter the Act). Claimant sought temporary total disability compensation as a result of a work related injury that occurred on June 15, 1998. On February 8, 2001, Judge Campbell issued a Decision and Order, concluding that Claimant was not covered under the Act. The Benefits Review Board (Board) reversed the decision, finding Claimant was covered under the Act, and remanded the decision to determine whether Claimant is totally or partially disabled. Watkins v. Newport News Shipbuilding & Dry Dock Co., 36 BRBS 21 (2002).

On remand, Judge Campbell found that Claimant had not diligently sought alternate work, and accordingly awarded Claimant temporary partial disability benefits commencing June 15, 1998. The decision was appealed and the Board vacated the award of benefits and remanded for the Court to consider whether Employer had established the availability of suitable alternate employment. Watkins v. Newport News Shipbuilding & Dry Dock Co., No. 02-0798 (June 25, 2003). The decision was also remanded for this Court to determine the exact number of days that Claimant worked for Employer post-injury. Id.

Prior to the formal hearing, Claimant moved for modification under Section 22 of the Act, asserting a change in her condition. For trial purposes, this issue was consolidated with the issues on remand.

This case was reassigned to me and a formal hearing was held in Newport News, Virginia on August 20, 2004. The Parties were afforded a full opportunity to present testimony, submit documentary evidence, and give oral arguments. The following exhibits were received into evidence: Remand Claimant's Exhibits 1-4, and Employer's Exhibits 1-5.<sup>1</sup>

## **ISSUE ON REMAND<sup>2</sup>**

Whether Claimant is limited to partial disability benefits because Employer, through a labor market survey, has established the availability of suitable alternate employment in the open market?

## **SUMMARY OF EVIDENCE**

The Parties have previously stipulated that Claimant sustained an injury arising out of and in the course of her employment with Employer on June 15, 1998. (I Tr. 6). They have also stipulated that at the time of Claimant's injury to her back, her average weekly wage was \$559.34. (I Tr. 7). Furthermore, if it is determined that Claimant had an obligation to find alternate employment, the Parties have stipulated that Claimant has a residual wage earning capacity of \$220.00 (I Tr. 7-8).

The Parties also stipulated that Claimant is unable to return to her usual work. (I Tr. 7-8). Hence, Claimant has established a prima facie case of total disability. The Board has also upheld Judge Campbell's ruling that Claimant did not diligently seek

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<sup>1</sup> The following abbreviations will be used as citations to the record: RCX – Remand Claimant's Exhibits; EX – Employer's Exhibits; I Tr. – Transcript from the June 16, 2000 hearing; II Tr. – Transcript from the August 20, 2004 hearing.

<sup>2</sup> On remand the Board instructed this Court to establish the exact dates that Claimant worked for Employer post-injury. Based on the records provided at the hearing, I find Claimant worked for Employer from February 7, 2000 to February 28, 2000. (II Tr. 42).

alternative employment. Id. Specifically, the Board concluded that it was unreasonable for Claimant to rely on being recalled by the shipyard in view of the lack of work over the passage of time. Id.

Employer introduced vocational evidence to address whether suitable alternate employment existed. On June 14, 2000, William Y. Kay, a vocational consultant, completed a labor market survey at the request of Employer. (EX 1). While Mr. Kay did not testify at the June, 2000 hearing, his survey was introduced into evidence at that hearing. Based on the following information, Mr. Kay concluded that Claimant retained a wage-earning capacity of \$220.00 per week. (EX 1.02).

Due to time restrictions, Mr. Kay did not make an appointment to meet with Claimant. (EX 1.03). In order to assess Claimant's transferable skills, Mr. Kay used Claimant's job application and personnel records from Employer to obtain a history of Claimant's previous work duties and educational background. (EX 1.03). Claimant's physical work restrictions were also used in the analysis. These restrictions were imposed by Claimant's physician, Dr. J. Abbott Byrd III, who suggested Claimant not lift over fifteen pounds and restrict her bending. These restrictions were imposed on April 17, 2000. (EX 1.04). Within these parameters, Mr. Kay identified nine positions in the Hampton Roads Area that were compatible with Claimant's skills and physical capacity. (EX 1.11). Mr. Kay contacted each employer to verify there were openings for these positions. (EX 1.03). Moreover, the job descriptions were delivered to Dr. Byrd and Claimant. Dr. Byrd approved all nine positions as compliant with Claimant's work restrictions.

Mr. Kay identified several job opportunities under the heading of "[c]ustomer service, entry level positions." (EX 1.08). The duties of a dispatcher position with Associated Cabs Inc., which paid \$6.00 per hour, entailed answering calls and dispatching cabs through radio communication. (EX 1.12). Claimant would be seated eight hours a day; the only lifting would be to empty the trash can at the end of a shift. (EX 1.12). The employer would provide training and did not require any previous experience. (EX 1.12). Disabled American Veterans Thrift Store had cashier positions available, which paid \$5.25 per hour. (EX 1.13). The job entailed standing or sitting behind a counter and handling purchase transactions, as well as, straightening merchandise in the store. (EX 1.13). This position would require Claimant to work with her arms extended at shoulder level. (EX 1.13). Goodwill Industries of Hampton Roads had a position of donation center attendant, which paid \$5.15 per hour. (EX 1.14). This position required interaction with donors and organizing donation items. (EX 1.14). The job is mostly completed while sitting, but there would be some stooping, standing, walking, and pushing or pulling. (EX 1.14).

Mr. Kay also identified several cashier jobs for Claimant. The survey reported that West End Shell hires six cashiers a year. (EX 1.15). The cashiers are housed in heated and air conditioned booths, where they complete customer transactions and restock any supplies. (EX 1.15). Most of these duties can be completed while seated. A parking cashier position with Allright Auto Parks, Inc. was also included. This job

involved sitting or standing in a booth, and collecting payment for parking. (EX 1.16). The job paid \$6.00 per hour. (EX 1.16). Furthermore, Central Parking Systems was identified as a potential employer. (EX 1.17). The duties for their cashier positions involved similar responsibilities as the above employers and the pay was \$5.25. (EX 1.17). Specifically, the cashiers' duties include collecting tickets and payment for parking, which can be completed mostly while seated. (EX 1.17).

Lastly, Mr. Kay found that Claimant could find employment in unarmed security positions. Security Services of America had such positions available, where the duties included monitoring the parking lot and the property. (EX 1.18). Claimant could be seated most of the time, but may be required to walk or stand as needed. (EX 1.18). The job paid \$6.00 per hour. (EX 1.18). James York Security also had a position for an unarmed security guard with similar responsibilities. (EX 1.19). That job paid \$5.25 per hour. (EX 1.19). A position as a checkpoint guard with Globe Aviation had similar duties, and the pay was \$5.50 per hour. (EX 1.20).

## DISCUSSION

To establish entitlement to total disability benefits under the Act, Claimant bears the burden of establishing a prima facie case of total disability by showing that she cannot return to her usual employment due to a work-related injury. Trans-State Dredging Co. v. Benefits Review Board (Tanner), 731 F.2d 199 (4th Cir. 1984). At the June 16, 2000 hearing, the Parties stipulated that Claimant cannot return to her previous job at the shipyard. The burden now shifts to Employer, who may avoid paying total disability benefits by showing that suitable alternative employment exists which the injured employee can perform. On remand, the Board has instructed this Court to determine whether Employer has met this burden through a labor market survey completed on June 14, 2000.

The employer must prove the availability of actual identifiable, not theoretical, employment opportunities within the claimant's local community. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1042-43, 14 BRBS 156, 164-65 (5th Cir. 1981), rev'g 5 BRBS 418 (1977). The specific job opportunities must be of such a nature that the injured employee could reasonably perform them given his age, education, work experience and physical restrictions. Edwards v. Director, OWCP, 999 F.2d 1374 (9th Cir. 1993) cert. denied, 511 U.S. 1031 (1994). The employer need not place the claimant in suitable alternative employment, though the employer may meet this burden by providing such employment. Tanner, 731 F.2d at 1043, 16 BRBS at 75. The employer, however, must present evidence that a range of jobs exists within claimant's geographic area which he would realistically be able to secure and perform. Lentz v. Cottman Co., 852 F.2d 129, 21 BRBS 109(CRT) (4th Cir. 1988).

Employers may rely on the testimony of vocational experts to establish the existence of suitable jobs. Turney v. Bethlehem Steel Corp., 17 BRBS 232, 236 (1985); Southern v. Farmers Export Co., 17 BRBS 64, 66-67 (1985); Berkstresser v.

Washington Metro. Area Transit Auth., 16 BRBS 231, 233 (1984); Bethard v. Sun Shipbldg. & Dry Dock Co., 12 BRBS 691 (1980); Pilkington v. Sun Shipbldg. & Dry Dock Co., 9 BRBS 473, 477-80 (1978); see also Armand v. American Marine Corp., 21 BRBS 305 (1988) (stating the job market must be realistically available). The counselors must identify specific available jobs; market surveys are not enough. Campbell v. Lykes Bros. Steamship Co., 15 BRBS 380, 384 (1983); Kimmel v. Sun Shipbldg. & Dry Dock Co., 14 BRBS 412 (1981); see also Williams v. Halter Marine Serv., 19 BRBS 248 (1987) (stating there must be specific, not theoretical, jobs). The trier of fact should also determine the employee's physical and psychological restrictions based on the medical opinions of record and apply them to the specific available jobs identified by the vocational expert. Villasenor v. Marine Maintenance Indust., 17 BRBS 99, motion for recon. denied, 17 BRBS 160 (1985). To calculate a claimant's wage earning capacity, the trier of fact may average the wages of suitable alternative positions identified. Avondale Indust. v. Director, OWCP, 137 F.3d 326 (5th Cir. 1998).

In this case, as evidence of suitable alternative employment, Employer offered a labor market survey, prepared by Mr. Kay, a vocational consultant. The survey was completed on June 14, 2000. Claimant's treating physician, Dr. J. Abbott Byrd, III, imposed work restrictions suggesting Claimant only lift items less than fifteen pounds and limit the amount of her bending. (EX 1.04). These restrictions were imposed on the survey and considered along with Claimant's education and work experience. (EX 1.03). Mr. Kay identified nine openings for jobs that he concluded were compatible with Claimant's transferable skills and physical restrictions. These positions had an average wage of \$5.50 per hour or \$220.00 per week. (EX 1.03).

Mr. Kay's report identified numerous entry level positions that appeared suitable for Claimant and were all approved by Dr. Byrd. (EX 1.08). First, the report identified a dispatcher position with Associated Cabs, Inc. (EX 1.12). The position is within Claimant's work restrictions as it is completely sedentary, the only lifting required is emptying the trash can at the end of a shift. (EX. 1.12). The report also identified a cashier position with Disabled American Veterans Thrift Stores. This job would require more walking, standing, and some work with Claimant's arms extended at shoulder level. (EX 1.13). Mr. Kay also identified an entry level position as a donation center attendant with Goodwill Industries of Hampton Roads. (EX 1.14). This position is mostly sedentary, with some stooping, walking, and standing. (EX 1.14). Based on the information in the survey and Dr. Byrd's approval, I find these entry level positions compatible with Claimant's education, work experience and physical restrictions. Thus, these positions are suitable alternative employment opportunities.

Mr. Kay has also identified three employers who were hiring cashiers. West End Shell, Allright Parking, and Central Parking Systems each had openings for this position. (EX 1.10). Each employer classified a cashier's physical activity as predominately sitting, with standing and walking done as needed. (EX 1.15, 1.16, 1.17). Cashiers' duties include providing customer service, collecting money from customers, and restocking some supplies, all of which Claimant is qualified and physically capable of performing. Since these positions involve very little physical activity, such as lifting,

and are compatible with Claimant's experience, I find each cashier position to be suitable alternative employment.

Based on Claimant's educational background and work experience in an industrial setting, Mr. Kay determined that Claimant could find employment in unarmed security positions. (EX 1.10). According to the survey, these positions were available with Security Services of America, James York Security and Globe Aviation. (EX 1.10). Each of these positions requires the security personnel to monitor people and vehicles entering and leaving an area. Most of these duties can be completed while sitting, but walking and standing are required as needed. Dr. Byrd has also approved these positions as compliant with Claimant's restrictions. Furthermore, these employers do not require any experience and will provide training if necessary. The survey adequately demonstrates that these positions are also suitable alternative employment.

After the survey was completed these openings were forwarded to Claimant via certified and regular mail. (EX 1.02). The survey demonstrates that a range of jobs existed in the Hampton Roads area, which were reasonably available, and which Claimant could have realistically secured and performed. See Lentz v. Cottman Co., 852 F.2d 129, 21 BRBS 109 (CRT) (4th Cir. 1988). The conclusions drawn by Mr. Kay in the survey are creditable, as he has demonstrated that he was aware of Claimant's age, education, work experience, and physical limitations when he explored the local opportunities. See Southern v. Farmers Export Co., 17 BRBS 64, 66-67 (1985). Moreover, Mr. Kay contacted each of these employers and found that the positions were all available when the survey was conducted. (EX 1.03). Accordingly, I find that Employer has satisfied its burden of showing that suitable alternative employment for Claimant existed as of June 14, 2000, the date of the survey. In the survey, Mr. Kay has identified specific available jobs, approved by Dr. Byrd, which Claimant is capable of performing. Mr. Kay has provided sufficient descriptions of each position to demonstrate that Claimant could reasonably perform them given her education, work experience, and physical restrictions.

Since Employer has established suitable alternative employment, Claimant would now have the burden of demonstrating that she tried diligently, but was unable to secure employment. See Newport News Shipbuilding & Dry Dock Co. v. Tann, 841 F.2d 540, 21 BRBS 10(CRT) (4th Cir. 1988). If Claimant met this burden, she would be entitled to total disability benefits. The Board, however, has affirmed Judge Campbell's ruling that Claimant was not diligent in her job search. Watkins, No. 02-0798 (June 25, 2003). Specifically, Claimant did not seek any work, and it was determined that she was unreasonable in relying on being recalled by the shipyard. Id. at 5. Thus, Claimant is limited to an award of partial disability benefits commencing June 14, 2000.

### **ISSUE OF MODIFICATION**

Should Claimant's wage earning capacity be reduced, due to a change in economic conditions?

## **SUMMARY OF EVIDENCE**

### **A. Claimant's Testimony**

Claimant acknowledged that she did not make any effort to find alternative employment before March, 2002. (II Tr. 34). Claimant affirmed that during the spring of 2002 she worked part-time at Thomas Nelson Community College. (II Tr. 35). This position was in their bookstore, where her employer was Follett Higher Education. (II Tr. 36; RCX 2). Claimant also testified that she worked for Wal-Mart, Genus Portable Cleaning, Newport News School Board, and A&G Enterprises at various times during 2002 and 2003. (II Tr. 36). Each of these positions was part-time, and Claimant never held more than one at a time. Claimant has provided pay stubs and W2 tax forms from these employers. (RCX 1-4).

Claimant testified that she was unable to remain at any of these positions for a long period of time. She stated that the work restrictions recommended by her doctor prevented her from maintaining the position at Wal-Mart because it involved too much lifting and climbing. (II Tr. 37). Also, the position at A&G Enterprises, which is a laundry mat, involved too much bending. (II Tr. 37). Personal problems between Claimant and her supervisor, however, was the reason behind her leaving Genus Portable Cleaning. (II Tr. 37-38).

Claimant testified that she currently is working part-time for the Newport News School Board. (II Tr. 38). The position is a cafeteria monitor, and is only for two hours a day while school is in session. (II Tr. 38). Claimant affirmed that she has not made efforts to find employment since acquiring this position with the school district. (II Tr. 38). However, she was previously working with the Virginia Employment Commission, who provided her a list of employment opportunities. (II Tr. 38). Claimant also affirmed she was provided with the labor market survey conducted by William Kay. (II Tr. 39). However, she was unable to recall employers she contacted from that report. (II Tr. 39).

### **B. Testimony of William Kay**

Mr. Kay has a degree in psychology and is employed as a rehabilitation counselor or vocational consultant. (II Tr. 9-10). He worked as a Rehabilitation Counselor for Virginia for twenty-eight years, a private rehabilitation counselor for six and-a-half years, and has some experience as a medical social worker. (II Tr. 11). He is currently licensed and certified with the Commonwealth of Virginia. (II Tr. 11).

In June, 2000, Mr. Kay provided Employer with a labor market survey indicating suitable alternative employment for Claimant, given Claimant's qualifications. (II Tr. 11). This survey was introduced into evidence. (EX 1). Employer provided Mr. Kay with Claimant's work restrictions as imposed by Dr. Byrd, Claimant's treating physician. These restrictions, which were no lifting over fifteen pounds, and limited bending, were used in the preparation of the survey. (II Tr. 12). In addition to these restrictions, Mr.

Kay also considered Claimant's previous employment history and educational background. (II Tr. 13). Mr. Kay identified specific jobs in three categories, entry level positions, parking cashier, and security positions, all of which fit within Claimant's restrictions. (II Tr. 13).

In March, 2004, Employer asked Mr. Kay to review and update the survey. The updated survey was introduced into evidence. (EX 4). Mr. Kay testified that there were no changes in the job responsibilities or availabilities of the positions with Associated Cabs, Inc., Disabled American Veterans Thrift Store, or Goodwill Industries of Hampton Roads. (II Tr. 15). However, Mr. Kay concluded that the position with West End Shell had undergone significant changes, so that they would no longer have a position for Claimant. (II Tr. 16). Mr. Kay also testified that Allright Auto Park, Inc., still had a position as a parking cashier, but Mr. Kay was unable to contact and verify whether Central Parking Systems still had an opening. (II Tr. 17). In the category of security personnel, Mr. Kay testified that positions with Security Services of America and James York Security remain unchanged and available to Claimant. (II Tr. 18). However, Mr. Kay was no longer able to recommend a position as a security guard position with Globe Aviation because of important changes to airport security in the last couple years. (II Tr. 18).

Mr. Kay also provided two new employment opportunities that he found suitable for Claimant to substitute for the positions he determined were no longer appropriate. First, Mr. Kay affirmed that he thought a cashier position with Airport Exxon was suitable based on Claimant's work restrictions, educational background, and other experiences. (II Tr. 20). Mr. Kay made this conclusion after discussing the position with a manager at Airport Exxon. (II Tr. 19). Secondly, Mr. Kay affirmed that he thought Claimant was qualified for openings as a parking cashier with the City of Norfolk. (II Tr. 20). Based on the job description the City of Norfolk provided on the internet, Mr. Kay believed Claimant was capable of completing the physical requirements. (II Tr. 21).

Mr. Kay affirmed that he submitted the original survey to Claimant and her treating physician, Dr. Byrd. (II Tr. 21). Dr. Byrd then approved each position as within the parameters of Claimant's work restrictions. (II Tr. 22). Mr. Kay then testified as to the availability of these positions since the original survey was completed in June, 2000. Mr. Kay stated that he is familiar with many of these employers because of the constant interaction with them that his position requires. (II Tr. 22). Mr. Kay affirmed that many of the employers, such as Security Services of America, Associated Cabs, Inc., and Good Will Industries, hire regularly. (II Tr. 22-23). Mr. Kay described the other employers has hiring "periodically" or "on a fairly regular basis." (II Tr. 23-24). These employers, such as the City of Norfolk, Disabled American Veterans Thrift Store, James York Security, and Airport Exxon, seem to hire once every couple of months. (II Tr. 24).

Based on this information, Mr. Kay concluded that Claimant has remained employable at wages of \$5.50 an hour, or \$220.00 per week based on 40 hours of work. (II Tr. 25). In his opinion, nothing has changed as to warrant a reduction in Claimant's wage earning capacity. (II Tr. 25). According to Mr. Kay, Claimant would still be



employable at the same rate as she was when the original survey was completed. (II Tr. 25).

### **C. March, 2004 Updated Labor Market Survey of William Kay**

The updated survey contains the same information as the original survey, which was submitted in both the June 2000 hearing, and this hearing. Additionally, the updated survey listed any changes in the contact personnel for each employer, as well as, any changes in the job requirements. The only positions that experienced significant change were the cashier position at West End Shell and the security guard at Globe Aviation. (EX 4(b)). Mr. Kay also included descriptions of two additional job opportunities, which he felt were suitable for Claimant and could be substituted for these two positions.

A cashier position with Airport Exxon was included in the update. This position requires the employee to provide customer service, such as receiving money for purchases, and to restock supplies. (EX 4(m)). All the work is conducted from a booth located in the pump area of the service station. (EX 4(m)). The report states that any items that require lifting will not weigh more than ten pounds. (EX 4(m)). The employer has also indicated a willingness to accommodate any work restrictions of an employee. (EX 4(m)). Furthermore, the job requires 32 to 40 hours a week at a rate of \$5.50 per hour. (EX 4(m)).

Mr. Kay also included a parking attendant position with the City of Norfolk. The duties of this position require collecting fees for parking, interaction with patrons by providing directions or responding to complaints, and operating any equipment necessary for the operation of the parking garage. (EX 4(n)). The position may require long periods of standing and some walking. (EX 4(n)). Any lifting that is done would be of items less than ten pounds. (EX 4(n)). The hours per week vary, and the rate is \$6.90 per hour. (EX 4(n)).

## **DISCUSSION**

Section 22 of the Act states that any party-in-interest may, within one year of the last payment of compensation or rejection of a claim, request modification of a compensation award for mistake of fact or change in claimant's physical or economic condition. 33 U.S.C. § 922; see Metropolitan Stevedore Co. v. Rambo [Rambo I], 515 U.S. 291, 30 BRBS 1 (CRT) (1995). It is well established that the party requesting modification due to a change in condition has the burden of showing the change in condition. See e.g., Metropolitan Stevedore Co. v. Rambo [Rambo II], 521 U.S. 121, 31 BRBS 54 (CRT) (1997). A claimant may attempt to modify a disability award based on a change in economic circumstances by alleging that employment opportunities previously considered suitable are no longer suitable.

When a party seeks modification based on a change in condition, an initial determination must be made as to whether the petitioning party has met the threshold requirement by offering evidence demonstrating that there has been a change in the claimant's condition. Jensen v. Weeks Marine, Inc. (Jensen II), 34 BRBS 147 (2000), decision and order on remand at 35 BRBS 174 (2001). This initial inquiry does not involve a weighing of the relevant evidence of record, but rather is limited to a consideration of whether the newly submitted evidence is sufficient to bring the claim within the scope of Section 22. If so, then the administrative law judge must determine whether modification is warranted by considering all of the relevant evidence of record to discern whether there was, in fact, a change in claimant's condition from the time of the initial award to the time modification is sought.

In this case, Claimant wishes to modify her post-injury wage earning capacity, which was stipulated at \$220.00 per week in 2000. Claimant argues that there was a change in her economic condition as of 2002. In support of this claim, Claimant relies on her testimony, and W-2 forms and pay stubs for jobs she had over the course of 2002 and 2003. These jobs were all part-time and held separately, only supplying Claimant with limited income. Claimant contends that since 2002 she has sought employment, but these part-time positions are the only suitable jobs that are available for her in the market. These records show an earning capacity of less than \$220.00 per week. This evidence is sufficient to bring the claim within the scope of Section 22.

With the initial burden met, all relevant evidence must be weighed to determine if there was a change in Claimant's economic condition. In this modification proceeding, the applicable standard is the same as that which governs whether suitable alternative employment, or a lack of it, was established. Blake v. Ceres Inc., 19 BRBS 219 (1987). Employer has provided an update of the labor market survey originally prepared in 2000, and the testimony of the vocational consultant, William Kay, who prepared the survey. The survey provides a list of alternative employment positions that Mr. Kay has concluded were available and suitable for Claimant. These jobs included positions as a parking cashier, security guard or customer service personnel. (EX 4(a-b)).

Mr. Kay testified that seven of the positions have remained unchanged since the original survey. The report indicates that the job requirements have remained unaltered from the original report, which Claimant's treating physician, Dr. Byrd, approved. Accordingly, these positions have remained within the parameters of Claimant's work restrictions. These positions were also classified by this Court as suitable alternative employment for Claimant. Furthermore, Mr. Kay affirmed that he is very familiar with many of these employers and they are constantly hiring. (II Tr. 22). The survey also indicates that Mr. Kay talked with those employers who he was not in contact with on a regular basis. (EX 4(a-b)). Mr. Kay was able to verify that these employers have also continued to hire periodically. Employers, such as Good Will Industries and All Right Auto Park, hire new employees at a rate of once a month, to every six or seven months. (II Tr. 23). Furthermore, Mr. Kay verified that the employers have maintained this trend since January, 2000.

The updated labor market survey also provided two positions that Mr. Kay determined could substitute for the two positions that had undergone significant changes since the original survey. (EX 4(m), (n)). A position as a cashier with Airport Exxon was included, which paid at a rate of \$5.50 per hour. (EX 4(m)). The responsibilities of this job are comparable to the other cashier positions listed in the original survey. Most of the work can be completed while seated, and any lifting that is needed only requires the capacity to lift ten pounds. (EX 4(m)). Mr. Kay also contacted the employer, who informed him that they had not hired in recent months, but do hire at least three or four times a year. (II Tr. 24). Mr. Kay's survey also included a position as a parking attendant with the City of Norfolk. (EX 4(n)). This position seems comparable to the other parking cashier positions listed. The responsibilities include collecting fees, and providing customer service. (EX 4(n)). The job is within Claimant's work restrictions, as there is a limited amount of bending, and no lifting of items over fifteen pounds. Mr. Kay also testified that the City of Norfolk has an opening for this position about once every three months. (II Tr. 24). Mr. Kay's testimony and the information provided in the survey adequately demonstrate that both of these positions are suitable alternative employment for Claimant.

Mr. Kay concluded that he believed Claimant is, and has been since June 2000, employable at wages of \$5.50 an hour, and \$220.00 per week based on forty hours of work a week. (II Tr. 25). According to Mr. Kay's testimony and the updated survey, the market has remained consistent since the original survey was completed. When referencing the external labor market through a labor market survey, an employer must "present evidence that a range of jobs exists which is reasonably available and which the employee is realistically able to secure and perform." Lentz v. Cottman Co., 852 F.2d 129, 131 (4th Cir. 1988). The purpose of the labor market survey is not to find claimant a job, but to determine whether suitable work is available for which claimant could realistically compete. See Newport News Shipbuilding & Dry Dock Co. v. Tann, 841 F.2d 540, 542 (4th Cir. 1988). Based on the information contained in the updated labor market survey, and Mr. Kay's testimony regarding the availability of these positions, I find that Employer has satisfied its burden of establishing the availability of suitable jobs.

Claimant can nevertheless prevail in his quest to modify the wage earning capacity by demonstrating that she tried diligently and was unable to secure employment. See Hooe v. Todd Shipyards Corp., 21 BRBS 258 (1988). Claimant must establish a reasonable diligence in attempting to secure some type of suitable employment within the compass of opportunities shown by the employer to be reasonably attainable and available, and must establish a willingness to work. Trans-State Dredging v. Benefits Review Bd. (Tarney), 731 F.2d 199, 201-02, 16 BRBS 74, 76 (CRT) (4th Cir. 1984), rev'g 13 BRBS 53 (1980).

Claimant argues that she has diligently sought employment since 2002, but she is unable to find employment where her wage is \$220.00 per week. She contends that Employer's labor market survey is not indicative of opportunities in the market; and instead when this Court establishes her wage earning capacity it should rely on her

actual earnings for 2002 and 2003. (II Tr. 43). These earnings are from part-time positions Claimant held at Thomas Nelson Community College, Wal-Mart, Genus Portable Cleaning, and Newport News School Board. (II Tr. 35-36). The pay stubs and W-2 tax forms from these positions show a wage earning capacity of less than \$220.00 per week. (RCX 1-4).

It is clear from the labor market survey and Mr. Kay's testimony that suitable full time positions for Claimant exist within the Hampton Roads area. Claimant was provided with the original survey in 2000. (II Tr. 39). However, when Claimant began to make an effort to find employment in 2002, she does not appear to have searched within the compass of these opportunities. Claimant asserts that she did make an effort to find employment with these positions. (II Tr. 39). However, when pressed, she was unable to recall which employers she contacted, and vaguely asserted that they required work outside of her physical restrictions. (II Tr. 39). In contrast, the survey provides detailed descriptions of the job requirements, clearing showing that the necessary duties are within Claimant's restrictions. Furthermore, Claimant's treating physician, Dr. Byrd, has approved these jobs as suitable for Claimant. (II Tr. 22). I also find Mr. Kay to be a credible witness. He has affirmed that he contacted the employers mentioned in his survey and verified that they have hired on a regular basis since the year 2000. (II Tr. 22-24).

I find that Claimant has not established a willingness to work. While Claimant has found some employment in part-time positions, the record shows that she has had the opportunity to find employment in full-time positions. Instead of demonstrating a need to reduce her wage earning capacity, Claimant's testimony and evidence have merely shown compliancy in working one part-time job at a time. Through the labor market survey and Mr. Kay's testimony, Employer has demonstrated that the market contains suitable positions for Claimant where she can maintain a wage earning capacity of \$220.00 per week. Claimant has shown no diligence in acquiring any of these positions.

Therefore, I find Employer has established that suitable alternative employment for a wage earning capacity of \$220.00 per week has continued to exist and Claimant has not shown any diligence in acquiring such employment. Accordingly, Claimant's request for modification is denied.

## **ORDER**

It is hereby ORDERED that:

1. Employer shall pay Claimant temporary total disability compensation based on an average weekly wage of \$559.34 for the period June 15, 1998 to February 6, 2000.

2. Employer shall pay Claimant temporary total disability compensation based on an average weekly wage of \$559.34 for the period of February 29, 2000 to June 13, 2000.
3. Employer shall pay Claimant temporary partial disability compensation based on an average weekly wage of \$559.34 and a residual wage earning capacity of \$220.00 for the period of June 14, 2000 to the present and continuing.
4. Employer shall pay Claimant interest on any accrued unpaid compensation benefits at a rate provided by 28 U.S.C. § 1961.
5. Employer shall continue to furnish such reasonable, appropriate and necessary medical care for Claimant's work related injury pursuant to Section 7 of this Act.
6. Within thirty days of receipt of this decision and order, Claimant's attorney shall file a fully supported and fully itemized fee petition, serving a copy thereof on Employer's counsel, who shall have ten days to respond.
7. All computations are subject to verification by the District Director.

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LARRY W. PRICE  
Administrative Law Judge

LWP